



March 24, 2000

Mr. Arturo G. Michel  
Bracewell & Patterson, L.L.P.  
South Tower Pennzoil Place  
711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR2000-1161

Dear Mr. Michel:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 133260.

The Houston Community College System (the “system”), which you represent, received a request for documentation of electronic mail messages referencing the requestor’s name during a specified time interval.<sup>1</sup> You have submitted the responsive information for our review. You claim that it is excepted from public disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>2</sup>

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<sup>1</sup>You inform us that, after receiving the initial request for information on January 5, 2000, the system sought clarification of the request, which it received from the requestor on January 10. If a request for information is not clear to a governmental body, it may ask the requestor for a clarification. *See* Gov’t Code § 552.222(b). During the interval in which the governmental body and the requestor are communicating in good faith to narrow or clarify a request, the governmental body’s deadline under section 552.301 to seek a decision as to whether requested information is excepted from required public disclosure is tolled. *See* Open Records Decision No. 663 at 5 (1999).

<sup>2</sup>We note that the clarified request inquires how long the system retains employee e-mail information. As you have not addressed this aspect of the request, we presume that the system has released to the requestor any responsive information that is available in written form. *See* Gov’t Code §§ 552.301(e)(1), 552.302.

As amended by the Seventy-sixth Legislature, section 552.103 of the Government Code, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both prongs of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). In this instance, you explain that the requested information relates to a pending grievance proceeding that the requestor has instituted against the system under chapter 554 of the Government Code. You also have submitted documentation relating to the grievance proceeding, which we have reviewed. We note that section 554.006 of the Government Code

provides in relevant part that an aggrieved party must initiate action under the grievance or appeal procedures of the employing state or local governmental entity before filing suit. *See* Gov't Code § 554.006(a). We therefore find that the pendency of the grievance proceeding demonstrates that litigation is reasonably anticipated for the purposes of section 552.103. Having reviewed the documentation relating to the grievance proceeding and the information that you seek to withhold, we also find that most of the information in question relates to the grievance proceeding for the purposes of section 552.103. We therefore conclude that information relating to the grievance proceeding is excepted from public disclosure under section 552.103 of the Government Code. We have indicated in red the information that the system may withhold. As you have not raised any other exception to disclosure of the information that is not excepted under section 552.103, that information must be released.

In reaching this conclusion, we assume that the requestor has not seen or had access to any of the submitted information in connection with the grievance proceeding or otherwise. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If an opposing party to anticipated or pending litigation has seen or had access to requested information relating to the litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Moreover, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

As we are able to make a determination under section 552.103, we do not address your claim under section 552.101 of the Government Code. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

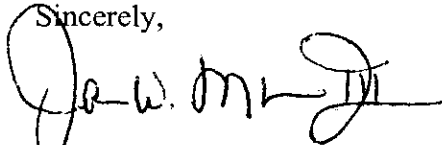
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ch

Ref: ID# 133260

Encl. Submitted documents

cc: Mr. Christopher Jones, M.A.  
7317 Staffordshire, #2  
Houston, Texas 77030  
(w/o enclosures)